

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





76-4186

Docket No. 76-4186

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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KNUT H. FRIESS,

Appellant-Petitioner,

- vs -

IMMIGRATION AND NATURALIZATION SERVICE,

Appellee-Respondent.

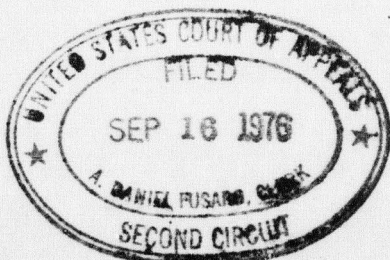
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APPELLANT'S APPENDIX

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JEFFREY H. SWARTZBAUGH  
Attorney for Appellant,  
KNUT H. FRIESS  
816 Prudential Building  
Buffalo, New York 14202  
Tel. No. (716) 856-1192



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P/s



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UNITED STATES DEPARTMENT OF JUSTICE  
IMMIGRATION AND NATURALIZATION SERVICE

United States Court House  
Buffalo, New York 14202

Knut H. Friess  
66 Meigs Street  
Rochester, New York 14607

Refer To This File No.  
A20 372 484

Date:  
September 23, 1974

DECISION ON APPLICATION FOR STATUS AS PERMANENT RESIDENT

Upon consideration, it is ordered that your application for status as a permanent resident be denied for the following reasons:

SEE ATTACHMENT

You are granted to October 23, 1974 to effect your departure from the United States voluntarily, without the institution of proceedings to enforce your departure. You must notify this office before that date on the enclosed card (Form I-438) of the arrangements you have made to depart from the United States. *At the time of your departure from the United States, do not fail to surrender Form I-94, Arrival-Departure Record, in accordance with the instructions on that form.*

If you fail to depart from the United States by the date specified, proceedings will be instituted to enforce your departure. You may renew your application for status as a permanent resident during such proceedings.

Sincerely yours,

*William A. Betness*  
District Director

Enclosure(s) ☒ I-438  
☒ I-94  
☐ Passport  
☒ M-188



September 23, 1974

In the absence of any indication that you are entitled to any other immigrant classification you must, pursuant to Section 203(d) of the Immigration and Nationality Act, be presumed to be classifiable as a nonpreference immigrant.

A nonpreference immigrant, who will be employed in the United States, is subject to the provisions of section 212(a)(14) of that Act, as amended. That section requires that such an immigrant must obtain a certification from the Department of Labor that a shortage exists of qualified workers available to perform the work in which he would be engaged, and that his employment would not adversely affect the wages and working conditions of persons similarly employed in this country. It appears that you will be employed in the United States and that you are not exempt from the aforementioned labor certification requirement.

Since you have failed to submit a valid labor certification and are subject to the requirement thereof, you are ineligible under section 245.1 (e), Title 8, Code of Federal Regulations, for adjustment of status as a nonpreference immigrant. In addition, by failing to comply with the labor certification requirement, you have not acquired a priority date for allocation of a nonpreference visa number. Accordingly, you have not established that an immigrant visa is immediately available as required by section 245 of the Immigration and Nationality Act, as amended.



UNITED STATES DEPARTMENT OF JUSTICE  
Immigration and Naturalization Service

File- A20 372 484 - Buffalo

SEP 26 1974

In the Matter of )

KRIST H. FRIESS )

In Deportation Proceedings

- Respondent - )

CHARGE: I & N Act - Section 241(a)(2), remained longer - Nonimmigrant trainee.

APPLICATION: Adjustment of status - I & N Act - Section 245, or voluntary departure.

In Behalf of Respondent:

In Behalf of Service:

Lamantia, Calacak & Swartzbaugh, Esqs. Gordon W. Sacks, Esq.  
816 Prudential Building  
Buffalo, New York 14202

Trial Attorney  
Buffalo, N. Y. 14202

Jeffrey M. Swartzbaugh, . of counsel

DECISION OF THE IMMIGRATION JUDGE

The respondent is a 35 year old married male alien, a native and citizen of Germany who entered the United States at Buffalo, New York on about December 31, 1973, at which time he was admitted as a nonimmigrant trainee under provisions of Section 101(a)(15)(H), of the Immigration and Nationality Act, and was authorized to remain in the United States until March 31, 1974. On November 18, 1974 he was granted permission to leave the United States voluntarily without the issuance of an Order to Show Cause on or before November 25, 1974, but failed to do so. Deportability has been conceded and is found to be established as charged in the Order to Show Cause.



The respondent has renewed an application for adjustment of status to that of a permanent resident under Section 245 of the Immigration and Nationality Act, previously denied by the District Director on September 23, 1974 and in the alternative has requested the privilege of voluntary departure.

The record indicates that the respondent is a lawyer by profession who was admitted to Canada as a landed immigrant in 1969. From September 1972 until March 1973 he attended the Zen Center, in Toronto and came to the United States in December 1973 to complete training in Zen Buddhism at the Zen Center in Rochester, New York, which is an affiliate of the Toronto, Zen Center. The respondent has testified that he performs menial chores at the Center and that while training receives \$50 per month from the Zen Center for his personal needs. He stated that the money which he receives is raised by dues contributed by members and people who visit the Center.

A statement issued by the Director of the Zen Center at Rochester indicates that the time for completion of the course of training may vary from 3 to 5 years. It further indicates that "a student is required to engaged in study zazen-meditation, manual work, and various other activities, all of which are intended to lead to religious awakening, or enlightenment. The aim of training, in addition to enlightenment is the development of a strong character and warm personality equipping the student to become a teacher." The respondent has stated that after the completion of this training he'll be sent by the Zen group to Canada or Germany-and on graduation might possibly become a minister.



An issue has been raised concerning the requirement of a labor certification by the respondent pursuant to Section 212(a)(14) of the Immigration and Nationality Act, and the regulations promulgated there under. The respondent admittedly does not have such a labor certification and claims that he is not required to have one because he is not in, and does not propose to enter the labor market, despite the fact that he is receiving \$50 per month from the Zen Center.

Even if it be assumed that the services which respondent performs, and the \$50 monthly stipend which he now-receives at the Zen Center do not, *per se*, constitute entry into the labor market at present, it is nevertheless believed that he is required to have a labor certification. According to his testimony, respondent's primary purpose in attending the Zen Center is to pursue a course of study and training in Zen Buddhism for about 3 years. However, it does not appear that he is committed to study for any fixed period of time, and as an employable person may decide to enter the labor market at any time in the reasonably <sup>foreseeable</sup> ~~presumable~~ future. Although a certain category of students was formerly exempt from the requirement of a labor certification, pursuant to 8 CFR 212.8(3) that exemption was revoked by regulation published August 2, 1972 (37 Fed. Reg. 15419) and republished on August 28, 1973 (38 Fed. Reg. 22964).

Since the respondent's participation at the Zencenter may be <sup>equated</sup> with that of a student, and since he is not entitled to any specific exemption under 8 CFR 212.8(3), it is believed that he is required to have a labor certification.



Assuming further that the respondent does not need a labor certification to qualify for adjustment of status to that of a permanent resident, nevertheless as a matter of discretion that privilege should not be extended to him. Respondent was admitted to the United States for a specific purpose as a non-immigrant trainee, to further his study and training in Zen Buddhism. Although his temporary stay in the United States for that purpose has long since expired he now seeks to accomplish indirectly what he was unable to do directly, namely to extend his stay in this country on a permanent <sup>basis</sup> status for the very purpose <sup>for</sup> which he was admitted temporarily. Such an attempt to convert a temporary admission into permanent residence should not be sanctioned. Under the circumstances his application for adjustment of status will be denied.

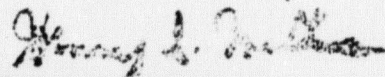
The maximum relief for which the respondent qualifies and which should be extended to him is the privilege of voluntary departure. He will be granted a final opportunity to leave this country voluntarily within 2 months from the date of this decision. Upon his failure to do so, he should be deported. He has designated Germany as the country to which he prefers to be deported, and deportation will therefore be directed to that country.

ORDER: IT IS ORDERED that respondent's application for adjustment of status under Section 245 of the Immigration and Nationality Act, be denied.

IT IS FURTHER ORDERED that in lieu of an order of deportation the respondent be granted voluntary departure without expense to the government, within 2 months from the date of this decision or any extension beyond such date

as may be granted by the District Director and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if respondent fails to depart when and as required the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: respondent shall be deported from the United States to Germany on the charge contained in the Order to Show Cause.



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HENRY I. MILLMAN  
Immigration Judge





United States Department of Justice

Board of Immigration Appeals

Washington, D.C. 20530

File: A20 372 484 - Buffalo

MA 7 - 1976

In re: KNUT H. FRIESS

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jeffrey H. Swartzbaugh, Esq.  
Lamantia, Gelacak & Swartzbaugh  
816 Prudential Building  
Buffalo, New York 14202

ON BEHALF OF I&N SERVICE: Richard K. Rogers  
Acting Trial Attorney

CHARGES:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251  
(a)(2)) - Nonimmigrant trainee -  
remained longer

APPLICATION: Adjustment of status pursuant to section  
245, Immigration and Nationality Act; or,  
in the alternative, voluntary departure

This is an appeal from the September 26, 1975 decision of the immigration judge in which he found the respondent deportable as charged, denied his application for adjustment of status, and granted him two months voluntary departure, with an alternate order of deportation to Germany. The appeal will be dismissed.

The respondent, a native and citizen of Germany and a landed immigrant in Canada, was admitted to the United States on December 31, 1973 as a nonimmigrant trainee authorized to remain until March 31, 1974. His application for status as a permanent resident, filed on January 17, 1974, was denied by the District Director on September 23, 1974 on the ground that the respondent was going to be employed in the United States, was not exempt



from the labor certification requirement of section 212 (a)(14) of the Immigration and Nationality Act, and did not have a labor certification or, therefore, a priority date. The District Director concluded that the respondent was ineligible for adjustment of status. On November 18, 1974 the respondent was granted seven days within which to depart from the United States; he failed to depart. Deportability is conceded.

The facts of this case are as follows. The respondent, a lawyer by profession in Germany, journeyed to Canada, where he became a landed immigrant, and studied at the Zen Center in Toronto, Canada from September 1972 to March 1973. Because there are only members but no Zen teachers at the Center in Toronto, the respondent wished to enter the United States to complete his training at the Zen Center, which is a Buddhist Community, in Rochester, New York. He wanted to enter the United States for 18 months, but was informed that he could enter for only six months at a time and apply for extensions. His Order to Show Cause shows that he was admitted for only three months. The respondent testified that when he applied for his first extension he was told it was very unlikely he could get it renewed for a long time, so he sought the advice of a lawyer.

According to the director of the Zen Center, in his letter of January 30, 1974, the program at the Zen Center includes "study, zazen-meditation, manual work, and various other activities, all of which are intended to lead to religious awakening, or Enlightenment." The training period varies in length, depending on the individual readiness of each student. The Center is selective in its choice of students, since it cannot train a great many. The director of the Center felt that the respondent showed "exceptional promise" and would make a "genuine contribution towards a better society" if he could complete his training, which would take three to five years. The director of the Center then stated that he would personally guarantee that the respondent would not become a public charge.

It appears to us that the work the respondent would do at the Center, chiefly maintenance of the Center and its functions, is part of the training program and must



be done by the students or trainees there. However, although the Center probably would not hire outsiders to perform this work for wages, we think that a labor certification is required nevertheless.

Aliens who seek to enter the United States to perform religious duties are considered to be coming to perform skilled or unskilled labor and therefore must obtain a labor certification, although they are precertified by regulation. 29 C.F.R. 60.2(a)(1) and 60.7, Schedule A, Group III(a), (b), and (c). No provision is made for precertification or a waiver of certification for those who are in training for an occupation in one of the Group III categories. Moreover, in an analogous situation, a student over 16 years of age who was potentially employable was required to obtain a labor certification. Matter of Redekop-Remping, 11 I&N Dec. 674 (BIA 1966).

On the basis of the foregoing, we find that because he does not have a valid labor certification, the respondent is not eligible for adjustment of status. Consequently, the following order will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order, the respondent is permitted to depart from the United States voluntarily within two months from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

Chairman



UNITED STATES DEPARTMENT OF JUSTICE  
IMMIGRATION AND NATURALIZATION SERVICE  
United States Court House  
Buffalo, New York 14202

Phone: 842-3575

PLEASE REFER TO THIS FILE NO.

A20 372 484 DD&P

JULY 15th, 1976

Mr. Knut H. FRIESS  
c/o 66 Meigs Street  
Rochester, New York 14607

Dear Sir:

This is a warning. Please read carefully.

It has been ordered that you be deported to GERMANY.  
You will be informed when departure arrangements are complete. If needed, we will assist you as much as possible in arranging your personal affairs for departure.

Should you wish to return to the United States you must write this office or the American Consular Office nearest your residence abroad as to how to obtain permission to return after deportation. By law (Title 8 of United States Code, Section 1326) any deported person who returns without permission is guilty of a felony. If convicted he may be punished by imprisonment of not more than two years and/or a fine of not more than \$1,000.00.

Please keep this letter and refer to the above file number when writing to this office.

c: Jeffrey H. Swartzbaugh, Esquire  
816 Prudential Building  
Buffalo, New York 14202

Very truly yours,  
For The District Director

Russell A. Inera, Supervisory  
Deportation Officer

Advertencia importante. Lea cuidadosamente este aviso.

Se ha ordenado deportarlo a \_\_\_\_\_.  
Se le informará una vez finalizados los arreglos para su salida. Si fuera necesario, le prestaremos la mayor ayuda posible para arreglar sus asuntos personales antes de su salida.

Si usted deseara regresar a los Estados Unidos, debe escribir a esta oficina o al Consulado de los Estados Unidos más cercano a su residencia en el exterior con el fin de informarse sobre la forma de conseguir permiso para regresar después de haber sido deportado. Por ley (Título 8 del Código de los Estados Unidos, Sección 1326), toda persona deportada que regrese a los Estados Unidos sin permiso incurre en un delito mayor. De ser declarado culpable, puede recibir una pena de prisión no mayor de dos años y/o una multa que no exceda de 1.000 dólares.

Sírvase conservar esta carta y haga referencia al número de registro arriba indicado al escribir a esta oficina.

Form I-294  
(Rev. 6-1-70) N

• GPO : 1970 O - 386-065

See Portuguese, Greek and Chinese translations  
on reverse.

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